Supreme Court, U.S.
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NO. 90-200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

H. W. MITCHELL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

W. DOUGLAS MATTHEWS
Counsel of Record

TIMOTHY F. LEE
SCHMIDT & MATTHEWS, P.C.
2140 First Interstate Bank Plaza
1000 Louisiana
Houston, Texas 77002
(713) 651-1133

Counsel for Respondent

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

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STATEMENT OF THE CASE

A. Introduction

On a dark, winter night in 1984, respondent Haskell Mitchell, a brakeman for petitioner, was required to board a moving engine pulling a train through North Texas. Because he could not see the ice covering the engine steps and grab-irons, his feet and hands slipped and he slid to the ground. He clung to the grab-irons so that he would not roll under the engine and was dragged along the ground. He received multiple injuries to his back. After several operations to his back, he has been physically unable to find gainful employment since this incident about six years ago.

At the trial of this case, the trial court gave the jury an instruction concerning "foreseeability" or "knowledge" about the unsafe conditions which confronted Haskell Mitchell. The jury found for the Missouri-Kansas-Texas Railroad Company (M-K-T or petitioner). The Texas Supreme Court ultimately reversed and remanded this case for a second trial because the instruction was improperly worded. Out of this Texas procedural decision, petitioner has applied for a writ of certiorari claiming that the decision of the Texas Supreme Court violated its substantive federal rights under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1986) (FELA).

B. Statement of Facts

On January 21, 1984, the M-K-T train was brought through the Denison Yard in Denison, Texas,[1] a small comunity located near the Texas-Oklahoma border about 60 miles north of Dallas. The train was going from Oklahoma to Dallas.[2] It arrived at the Denison Yard about 5:30 a.m.[3] The winter morning was dark and cold.[4]

The crew was required to board the train as it was moving between 3 and 6 miles per hour.[5] It was dark at the boarding location in the Yard because both an overhead light and a light on the engine were not work-

1. S.F. 194. References to the reporter's transcript of the testimony, referred to as the statement of facts in the Texas practice, will be abbreviated "S.F." followed by a page number.

2. S.F. 194-95.

3. S.F. 197.

4. S.F. 202.

5. S.F. 240-241; 290-91; 309; 424; 538-39.

ing.[6] When respondent tried to board the engine, he could not see the ice on the engine steps and grab-irons. He lost his footing on the steps and his hold on the grab-irons, and then slid down the ice-covered surfaces. Mr. Mitchell hit the ground and was dragged along by the engine for a short distance before he was able to get back up on it.[7] Several hours after respondent's fall, the train stopped briefly at Atkins, Texas. In the light of the morning sun, the crew could see that the engine was covered with ice.[8]

At the time of this incident, respondent was a forty-nine year old brakeman with a wife and two sons. He earned about $33,000 per year. In this incident, five levels of respondent's back were injured and he underwent three surgical fusions. Because of his injuries, he has been in such pain that he cannot sleep through the night and suffers from severe depression.[9] He is totally disabled from railroad work and has not been able to find a non-railroad job he can do since January 21, 1984.

C. Procedural History

After the evidence was presented, the trial court submitted special issues and instructions to the jury.[10] The

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6. S.F. 212-13.

7. S.F. 203-04.

8. S.F. 209.

9. S.F. 187; 220; 222; 226; 230.

10. The jury instructions, as is the normal Texas practice, were contained in part in the special issues or special verdict forms submitted to the jury. The FELA negligence question, which included the instruction at issue in this case, was submitted as Special Issue No. 4. Pet. App. at 55a-56a.

negligence and causation questions were submitted in one special issue, as is the Texas practice.[11] As a part of the negligence and causation special issue, the jury was instructed that:

> In answering this issue, you are instructed that, before negligence, if any, can be established against the Defendant Railroad, it must be shown that the Defendant, Railroad, through its officers, agents and/or employees, knew, or, in the exercise of ordinary care, should have known of an unsafe condition, if any.[12]

Pet. App. at 56a. The specific wording of this instruction was not requested by either party. Instead, the trial court —which had never before tried a FELA case—drafted the instruction on its own after the charge conference. Despite respondent's extensive objections to this instruc-

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11. Tex. R. Civ. P. Ann. r. 277 (Vernon Supp. 1990). ("In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions.") The instruction in question was appended to the negligence and causation special issue. Pet. App. at 55a-56a. The Texas Supreme Court held that this instruction "confused the issue of foreseeability relating to duty with the concept of causation." Pet. App. at 8a. There is ample authority that under the FELA the jury should not be instructed on foreseeability with respect to causation. *See, inter alia, Page v. St. Louis Sw. Ry.*, 312 S.W.2d 84, 92 (5th Cir. 1963); *Dutton v. Southern Pac. Transp.*, 576 S.W.2d 782, 784-85 (Tex. 1978). The Texas Supreme Court left open the question of whether or not a differently phrased knowledge instruction placed in a different location in the charge would be error.

12. The Texas Supreme Court refers to this instruction as dealing with foreseeability. Petitioner refers to it as dealing with the employer's knowledge. In Texas, "foreseeability" means that the actor, as a person of ordinary intelligence, should have anticipated the dangers that his negligent conduct created. *Williams v. Steves Indus.*, 699 S.W.2d 570, 575 (Tex. 1985). An actor's knowledge of the hazard is obviously one of the components of foreseeability.

tion, the trial court gave it to the jury and the jury found for petitioner.

Respondent appealed to the Texas Court of Appeals. Respondent argued that the instruction improperly burdened his rights under the FELA because it had the effect of requiring him to prove foreseeability in order to prove causation. The Court of Appeals, by a two to one decision, rejected respondent's arguments.

Respondent then sought review by the Texas Supreme Court. On rehearing, that court reversed this case and remanded it for a new trial. The Texas Supreme Court held that "the question of the employer's knowledge may be one for the jury; however, in this case, the instruction confused the issue of foreseeability relating to duty with the concept of causation."[13] Pet. App. at 8a. The court also approved the Fifth Circuit Pattern Jury Instructions for use in Texas courts in future FELA cases, observing that: "[u]se of the . . . *Pattern Jury Instructions* will allow the jury to decide disputed facts relating to the employer's knowledge, will allow the court to decide the legal question of duty, and will prevent the jury from regarding a finding of foreseeability as a prerequisite to its answering the causation issue affirmatively." Pet. App. at 9a-10a. The Fifth Circuit Pattern Jury Instructions for FELA cases do not contain a "foreseeability" or "knowledge" instruction.

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13. The primary issue in the courts below was whether this instruction violated *respondent's* rights under the FELA. This issue turned on whether the instruction was, in effect, a foreseeability instruction that the jury applied to the causation issue. While this question is a close one—as indicated by the Texas Supreme Court's five-four split on the issue—it was decided in respondent's favor. The question before this Court is whether the Texas Supreme Court has violated *petitioner's* federal substantive rights.

REASONS FOR DENYING THE WRIT

Petitioner presents one question for this Court's review. That question is whether the FELA requires "that the jury consider whether a defendant had actual or constructive knowledge of a dangerous condition before the defendant can be found negligent?" Petition at I. This question has application only to FELA cases. The issues with which the Texas Supreme Court dealt in this case have little application outside of Texas. The lower court limited its holdings to the facts of this case. Pet. App. at 8a. This Court's policy has been to abstain from taking a case "if the decision did not involve an important question of law, did not create a diversity of decision in the lower courts, or would not seriously affect the administration of the law in other cases." *Bailey v. Central Vt. Ry.*, 319 U.S. 350, 357 (1943) (Roberts, J., dissenting). This case fits none of those criteria.

In presenting this question, petitioner assumes the burden of demonstrating two underlying propositions: (1) that the Texas Supreme Court in fact ruled that the jury should not "consider whether a defendant had actual or constructive knowledge of a dangerous condition" in an FELA lawsuit; and (2) that an FELA defendant is always entitled to an instruction concerning the railroad's knowledge as a matter of federal substantive right under the Act. Petitioner cannot demonstrate either of these propositions.

First. The Texas Supreme Court did not rule that a jury in an FELA case cannot consider whether a defendant had actual or constructive knowledge of a dangerous condition. The court held that the particular instruction in the particular charge given to the jury in

this case was reversible error.[14] Petitioner does not directly challenge this conclusion. The Texas Supreme Court did not preclude the jury from considering whether petitioner had actual or constructive knowledge of the facts that the Denison Yard was poorly lit at the location of the accident, that its crews normally had to board moving trains at that yard, or that the engine from which respondent fell was covered with ice on the morning of the accident.[15] In fact, the lower court held:

> This is clearly a case when the existence of a duty depends upon "the factual setting and the interplay of factual and legal questions." *Whether or not the railroad knew or should have known that ice had formed on the steps and grab-irons of the engine is,* when the evidence is in conflict, *the type of issue which is properly and best resolved by the finder of fact.*
>
> We hold that the question of the employer's knowledge may be one for the jury. . . .

Pet. App. at 8a (emphasis added, citations omitted). There is no conflict between the rule of law described by petitioner and the opinion of the Texas Supreme Court.

Petitioner cites several FELA cases which hold that knowledge or foreseeability of the hazard is required by the Act. The Texas Supreme Court agrees. As the quote

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14. The Texas Supreme Court held that "the question of the employer's knowledge may be one for the jury; however, in this case, the instruction confused the issue of foreseeability relating to duty with the concept of causation." Pet. App. at 8a.

15. While petitioner presents this case as if it only involves weather conditions, the hazard respondent faced was a combination of three factors: (1) boarding a moving engine in the dark; (2) inadequate lighting of the yard and on the engine; and (3) ice covering the engine steps and grab-irons.

from the Texas Supreme Court's opinion above indicates, the Court held that in this case the knowledge question was for the jury. The court observed that "under the weight of the authority foreseeability remains an element of duty." Pet. App. at 5a. The court suggested the Fifth Circuit Pattern Jury Instructions for FELA cases should be used in Texas, in part because those instructions would "allow the jury to decide disputed facts relating to the employer's knowledge. . . ." Pet. App. at 9a. Since the Texas Supreme Court has held that the jury should consider the employer's knowledge in FELA cases, the conflict which petitioner argues justifies this Court's review simply does not exist.

The *Mitchell* opinion leaves unchanged the FELA law concerning knowledge or foreseeability. The Texas Supreme Court has also left open the propriety of knowledge instructions in Texas FELA cases. The court simply held that the particular instruction given by the trial court in this case was erroneous because of the way it was worded. The first proposition which petitioner must demonstrate to this Court—the proposition that the lower court condemned all knowledge instructions in FELA cases—is simply not the case.

Second. Even if the Texas Supreme Court had held that a jury should not be charged on the railroad's knowledge of a dangerous condition in an FELA case, petitioner still must show that an FELA defendant is *always* entitled to a knowledge instruction as a matter of federal substantive right. The Texas Supreme Court did not consider this matter to be substantive. Pet. App. at 6a ("As no substantive right or defense of the statute is affected by this determination, we look to the law of the state to resolve this issue.").

Petitioner simply asserts that its substantive rights were violated, as if this is a self-demonstrating fact, but never explains how its rights have been impaired. In order for a violation of federal substantive rights to be involved, petitioner must show that its right to a knowledge instruction is absolute—that the absence of a knowledge instruction will always be reversible error. In other words, petitioner must show that all FELA dangerous condition cases in which railroad defendants do not receive a knowledge instruction should be reversed.[16]

Petitioner does not cite any authority which holds that a railroad defendant must always receive a knowledge instruction in an FELA case as a matter of federal substantive right. In fact, neither petitioner nor respondent have found a single case which holds that the lack of a knowledge instruction is reversible error. The very opinion which the petitioner urges is in conflict with the *Mitchell* decision, *Baynum v. Chesapeake & Ohio Ry.*, 456 F.2d 658 (6th Cir. 1972), does not hold that a knowledge instruction is a substantive right under the FELA or that its absence is reversible error. In *Baynum*, the plaintiff prevailed against the railroad at trial. 456 F.2d at 659. A knowledge instruction was not given to the jury. 456 F.2d at 659-60. Yet the lack of this in-

16. Petitioner cites numerous cases which hold generally that knowledge of the hazard or foreseeability is an element which a plaintiff must establish to demonstrate liability for negligence under the FELA. However, with the exception of *Baynum v. Chesapeake & Ohio Ry.*, 456 F.2d 658 (6th Cir. 1972), none of the cases which petitioner cites involve knowledge instructions. The Texas Supreme Court's opinion in this case is consistent with the general principles outlined by the cases petitioner cites. The Texas Supreme Court held that "we believe that under the weight of authority foreseeability remains an element of duty," and "[w]e hold that the question of the employer's knowledge may be one for the jury. . . ." Pet. App. at 5a & 8a.

struction was not held to be reversible error by the Sixth Circuit, and the plaintiff's verdict in *Baynum* was affirmed.[17]

Petitioner attempts to create the impression that a knowledge instruction is routinely given in the ordinary FELA dangerous condition case, and that the Texas Supreme Court is out of step with the majority of the courts. This is not true. Many jurisdictions submit FELA cases to the jury without any specific knowledge instruction. The easiest way to examine the practice of various jurisdictions is to look at their pattern (or standardized) jury instructions. For instance, the Fifth Circuit Pattern Jury Instructions for FELA cases do not include such an instruction. Committee on Pattern Jury Instructions, District Judges Association of the Fifth Circuit, *Pattern Jury Instructions (Civil Cases)* § 6 (West 1983). A knowledge instruction is also not recommended in the Eleventh Circuit FELA Pattern Jury Instructions. Committee on Pattern Jury Instructions, District Judges Association of the Eleventh Circuit, *Pattern Jury Instructions: Civil Cases* § 6.01 (West 1990).[18] Additionally, neither the Illinois

17. "Accordingly, under these circumstances, we determine that [the railroad] *was not prejudiced by the court's refusal to give the proffered instruction or its equivalent that [the railroad] could be held liable only if it had actual or constructive knowledge of the defect.*" *Baynum*, 456 F.2d at 660 (emphasis added).

18. The Ninth Circuit is the only other circuit which has adopted civil pattern jury instructions. While the Ninth Circuit model jury instructions do not include FELA instructions, they do include Jones Act instructions. Committee on Model Jury Instructions, Ninth Circuit, *Manual of Model Jury Instructions* § 14.02A-14.02C (West 1985). The Ninth Circuit model jury instructions do not require the jury be instructed on the issue of the employer's knowledge in Jones Act cases. Since the Jones Act incorporates the liability provisions of the FELA by reference, 46 U.S.C. § 688 (1986), it can be assumed that FELA jury instructions in the Ninth Circuit also do not include a knowledge instruction.

nor the California state pattern jury instructions for FELA cases recommend submitting a knowledge instruction to the jury.[19] Illinois Supreme Court Committee on Jury Instructions. *Illinois Pattern Jury Instructions (Civil)* §§ 160.00-160.24 (2nd ed. West 1971); Committee on Standard Jury Instructions, *Book of Approved Jury Instruction Forms—California Jury Instructions (Civil)* §§ 11.07-11.18 (7th ed. West 1990). The most commonly used non-statutory pattern jury instructions, which contain exhaustive suggested FELA instructions, do not contain a knowledge instruction. 3 E. Devitt & C. Blackmar, *Federal Jury Practice & Instructions* §§ 94.01-94.29 (1977 & Supp. 1990). Additionally, no knowledge instruction is suggested in the non-statutory jury instructions which were used prior to Devitt & Blackmar. *See* Mathes, *Jury Instructions & Forms for Federal Civil Cases* § 13, 28 F.R.D. 401, 493 (1961); Ford, *Forms of Interrogatories,* 38 F.R.D. 199, 282-285 (1965).

A knowledge instruction is not required in many of the jurisdictions where a large number of FELA cases are tried. This is significant in two ways. First, if petitioner's argument were valid, there should be many reported appellate cases squarely holding that a knowledge instruction must be given to the jury in an FELA case. Because of the great number of FELA lawsuits which have been tried and are still being tried without such an instruction, there should be cases which directly hold that the failure to give the instruction is reversible error. Petitioner cites no such cases and respondent has found none.

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19. California and Illinois have historically been the sites of a great deal of FELA litigation, probably because of the concentration of railroad workers and rail transportation in those states.

The large number of FELA cases which are being tried without a knowledge instruction is significant for a second reason. If this Court grants the petition for writ of certiorari in this case, it is inviting a substantial increase in the amount of FELA litigation which will come before it.[20] Clearly, if federal FELA cases in the Fifth, Ninth and Eleventh Circuits and state FELA cases in at least Texas, Illinois and California are routinely tried without knowledge instructions, granting the writ in this case will serve as a clear signal for parties who lose below to file their petitions for writ of certiorari with the Court. The increase in this Court's case load will be certain and substantial.

Finally, petitioner does not show how its substantive FELA rights were violated. The Texas Supreme Court has remanded this case for a new trial. The petitioner will be entitled to all of the rights which it previously had when the case is retried. The Texas Supreme Court has limited neither the evidence which the M-K-T may introduce at the second trial nor has it deprived the railroad of any defense it might have. Petitioner has lost nothing except the jury verdict which the Texas Supreme Court has determined was the result of an erroneous jury instruction. No denial of any federal substantive right has occurred simply because a party must submit to a second trial of a case in which the jury was incorrectly charged.

The FELA has been extensively interpreted by this Court, particularly in a long series of opinions dating

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20. Justice Frankfurter observed that granting certiorari in FELA cases also increases the filings of petitions for writ of certiorari in "other types of cases raising issues that likewise have no business to be brought here." *Rogers v. Missouri Pac. R.R.*, 352 U.S. 518, 544 (1957) (Frankfurter, J., dissenting).

from 1939 until the late 1950's. During these decades, in part because of the lower federal courts' reluctance to implement the humane purposes of the FELA, this Court virtually exercised supervisory jurisdiction over railroad cases. *See Wilkerson v. McCarthy,* 336 U.S. 53, 69-71 (1949) (Douglas, J., concurring). This Court decided a great number of FELA cases in this period in order to firmly reject the "narrow, technical approach of earlier years." *Kelley v. Southern Pac. Co.,* 419 U.S. 318, 334 (1974) (Douglas, J., dissenting). Because of this Court's earlier activism in policing the FELA, the Act is one of the most thoroughly and comprehensively explicated pieces of legislation in existence today.

Given this Court's wide-ranging commentary on the FELA, there can hardly be an argument on which the lower federal and state courts need further guidance from this Court.[21] By the same token, this Court's time is surely more profitably spent analyzing issues which it has not so carefully and exhaustively considered. Chief Justice Taft wrote more than sixty years ago that the Court should grant review only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393 (1923).

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21. The case at bar is not even of wide application in the limited arena of FELA litigation. The opinion in this case does not condemn all knowledge instructions in FELA cases, but rather finds error because of the phrasing of this specific instruction. The result in this case is limited to FELA cases brought in Texas state courts in which an instruction on knowledge is given which forces the plaintiff to prove foreseeability with respect to causation.

CONCLUSION

This case does not present the "special and important reasons" which are required for this Court's grant of plenary review. This is not a case which involves issues of broad application or importance to the public, but rather only involves a limited procedural area—FELA jury instructions—as it is applied in a single state—Texas. This case does not present a conflict between the opinion of the Texas Supreme Court and any decision of a federal court of appeals or of this Court. While the result in this lawsuit is unquestionably important to the litigants themselves, the Texas Supreme Court's decision is limited to the specific facts of this case.

The petition for writ of certiorari should be denied.

Respectfully submitted,

W. DOUGLAS MATTHEWS
Counsel of Record

TIMOTHY F. LEE
SCHMIDT & MATTHEWS, P.C.
2140 First Interstate Bank Plaza
1000 Louisiana
Houston, Texas 77002
(713) 651-1133

Counsel for Respondent

September 11, 1990